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Robert S. Griggs S. Ed.
University of Michigan Law School

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LABOR LAW—BOYCOTTS AND COERCION OF NEUTRAL EMPLOYERS UNDER THE TAFT-HARTLEY ACT—Four decisions rendered by the Supreme Court at the close of the 1950 term¹ may alleviate some of the confusion inherent in section 8(b)(4)(A) of Title I of the Labor-Management Relations Act of 1947.² This section, whose concern is with the motive with which union activity is undertaken, rather than with the character of the activity itself,³ is probably the most “broad-side” in the act. In essence, it purports to prohibit labor unions from engaging in or inducing strikes and concerted refusals to handle goods, “where an object thereof is . . . forcing or requiring . . . any employer or other person . . . to cease doing business with any other person.”⁴

¹ NLRB v. International Rice Milling Co., 341 U.S. 665, 71 S.Ct. 961 (1951); NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675, 71 S.Ct. 943 (1951); International Brotherhood of Electrical Workers v. NLRB, 341 U.S. 694, 71 S.Ct. 954 (1951); Local 74, United Brotherhood of Carpenters and Joiners of America, AFL, v. NLRB, 341 U.S. 707, 71 S.Ct. 966 (1951).

² 61 Stat. L. 136 (1947), 29 U.S.C. (Supp. IV, 1951) §§141-197.

³ NLRB v. International Rice Milling Co., 341 U.S. 665 at 672, 71 S.Ct. 961 (1951).

⁴ The text in full is: “Section 8. . . . (b) It shall be an unfair labor practice for a labor organization or its agents— . . .

“(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization

Literally, every strike called or induced by a union would seem to be within this proscription, since at least "an object" of every strike is the disruption of a crippling proportion of the struck employer's business. However, no one has ever seriously contended that Congress expected this construction, and it must be obvious without recourse to the act's legislative history that Congress had no intention of interfering, if it could, with the traditional use of the strike as an economic weapon, since such a purpose would be inconsistent with the retention in LMRA of the old "Wagner Act Bill of Rights"⁶ and of the section 13 residual guarantee of the right to strike.⁶ On the other hand, sections 8(b)(4) (A) and 303⁷ have since before the enactment of the act been referred to as the "secondary boycott sections" of the act,⁸ and there is no doubt that the kind of activity which Congress had in mind in enacting them was that which generally went by that designation at common law. Apparently Congress deliberately avoided the use of the term "secondary boycott" in these sections, because, although the term is a familiar one at common law, the courts are by no means agreed as to what sorts of activities are to be so described. Although some state acts use the term,⁹

or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . ."

One may wonder how Congress happened to refer to two such different kinds of activity in clause (A). Clause (B), on the other hand, is apparently directed merely to activity which would violate clause (A) anyway, prohibiting strikes, etc., which are undertaken to force "any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees" by the Board. Clauses (C) and (D) deal with purely primary action: strikes and other action by an outside union while another is certified, and jurisdictional strikes.

A proviso follows, "That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

⁵ Sec. 7. "Employees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The section was retained in LMRA, but modified to recognize also "the right to refrain from any or all of such activities."

⁶ "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." The last clause, and the specificity proviso, were added by LMRA.

⁷ The phraseology of §8(b)(4) is repeated word for word in §303, which creates a federal right not to be injured in the manners described, and authorizes federal district courts to hear suits asserting that right without limitation by reference to amount in controversy.

⁸ *NLRB v. International Rice Milling Co.*, 341 U.S. 665 at 667, 71 S.Ct. 961 (1951).

⁹ E.g., N.D. Laws, 1947, c. 242, §13; Wisconsin Employment Peace Act, §111.06(2)(g).

its use in the LMRA would have carried forward all the confusion of the common law and would have afforded but slight assistance to the courts. Thus, if the purpose of Congress was to express the desired proscription through the use of new and precise language, such purpose was admirable. At the same time, however, all must agree that this purpose was not realized. Because the legislative concern was known to have been with "secondary boycott" types of action, the confusion of the common law was carried forward in the act. But because the language was phrased in other terms, a new confusion was created. Thus the history of the interpretation of section 8(b)(4)(A) reveals a constant search for appropriate limitations to be read into the sweeping prohibitions.

I. *Prior Approaches to Section 8(b)(4)(A)*

As a general proposition it can be said that whenever a union encourages the disruption of any business dealings, there is a possibility that there has been violation of section 8(b)(4)(A). This statement, however, is subject first of all to at least two limitations explicit in the language of that section itself. The first of these is that the "business" which the union seeks to disrupt must be more than that which the ultimate, individual consumer himself does with a seller, i.e., that it is no violation for a union to organize a "consumer boycott," for in merely urging the public, and especially union members, not to patronize the place of business or the products of the employer with which it is engaged in a dispute, the union is neither engaging in a strike or concerted refusal to render services for the object of inducing the consumer boycott, nor is it seeking to induce employees of other employers to strike or to refuse, in the course of their employment, to handle goods.¹⁰ Second, for there to be a violation, the attempted disruption of business relations must be through the inducement of employee action and not by mere solicitation of the employer; thus it is no violation of section 8(b)(4)(A) for a union to demand that an employer discontinue dealing with the employer from whom concessions are sought, even if the threat is expressed otherwise to call or induce a strike or other concerted

¹⁰ *New Broadcasting Co. v. Kehoe*, (D.C. N.Y. 1950) 94 F. Supp. 113 (claim under §303 denied, where the plaintiff radio station showed that the union representing its employees, in order to force compliance with a collective bargaining demand, attempted to coerce various sponsors to cancel their advertising contracts with the plaintiff by black-listing those who did not cancel on direct solicitation, and urging union members not to patronize them).

action by the employees of the employer solicited.¹¹ These two limitations were the only ones explicit in the act and taken cognizance of by the Labor Board or the courts prior to the recent Supreme Court decisions. That a third exists, which is perhaps most important of all, based on a distinction between individual and "concerted" refusals to perform services, is suggested by these decisions.

In addition to these limitations explicit in the act itself, two other limitations had been read into section 8(b)(4)(A) prior to the recent Supreme Court decisions: that although as a general rule it was unlawful for a union, by engaging in or inducing employees in the course of their employment to engage in a strike or other refusal to render services, where an object was disruption of a business relation, nevertheless (1) the nature of the business relation between certain persons was such that disruption thereof could be forced or induced with impunity, under any and all circumstances;¹² and (2) although the business relation was not such that it could be interfered with in any manner desired, there were still certain circumstances under which a union was free to attempt its disruption.¹³

The first of these implicit limitations was the idea of Judge Rifkind of the Southern District of New York, who denied the Board's application under section 10(1)¹⁴ of the act for an injunction against certain union activities on the basis of reasoning which has come to be known as the "ally doctrine."¹⁵ The union in that case, which was engaged in a strike for a proper purpose against an engineering design firm, extended its activities by picketing another similar firm which, during the continuance of the strike, was performing on subcontract much of the struck firm's work. Although literally there was violation of section 8(b)(4)(A), the court held otherwise, noting that the legislative history of the section indicated congressional intent only "to outlaw what was there-

¹¹ Teamsters' Union (Arkansas Express, Inc.), 92 NLRB No. 64 (1950); Spokane Building & Trades Council (Kinsey Mfg. Co.), 89 NLRB No. 141 (1950).

¹² Douds v. Metropolitan Federation of Architects, Engineers, Chemists, and Technicians, Local 231, United Office and Professional Workers of America, CIO, (D.C. N.Y. 1948) 75 F. Supp. 672.

¹³ Oil Workers International Union (Pure Oil Co.), 84 NLRB 315 (1949); United Electrical, etc., Workers (Ryan Construction Corp.), 85 NLRB 417 (1949); International Brotherhood of Teamsters, etc. (Schultz Refrigerated Service, Inc.), 87 NLRB 502 (1949); Newspaper & Mail Deliverers' Union (Interborough News Co.), 90 NLRB No. 297 (1950).

¹⁴ Sec. 10(1) makes it mandatory upon the Board to seek temporary injunctive relief, pending the usual unfair labor practice hearing, when it has "reasonable cause to believe" that there has been a violation of §8(b)(4)(A), (B), or (C), and creates jurisdiction in the district courts to grant the same under certain conditions.

¹⁵ Douds v. Metropolitan Federation, etc., (D.C. N.Y. 1948) 75 F. Supp. 672.

tofore known as a secondary boycott,"¹⁶ and that "read with the aid of the glossary provided by the law of secondary boycott," the business relation between a primary employer and one to whom it subcontracts during a strike work which it would otherwise have done itself is not "doing business" within the meaning of the act. Judge Rifkind's conclusion is easy to agree with on policy grounds, harder if the admonition is heeded that "resort to legislative history is only justified where the face of the Act is inescapably ambiguous."¹⁷ But, unlike the other limitation which was read into section 8(b)(4)(A), it is possible at least to support the "ally doctrine" without accepting the view that only common law secondary boycotts, whatever they may be, are prohibited, since it could still be said that "doing business" should be interpreted to refer only to the relation between a primary employer from whom a labor concession is being sought, and a secondary, neutral person who has no substantial interest in the outcome of the labor dispute but is being injured incidentally by the activity in which the union engages to force that outcome. There is certainly stronger authority in the legislative history of the act for saying that section 8(b)(4)(A) was intended only to protect such neutrals from incidental injury than there is for so construing the section as to read into it all of the confusion of the common law, which it was Congress' indubitable intention to avoid perpetuating.¹⁸ The "ally doctrine" has been strictly applied, however, in the later cases: it is clear both that it is not to be accorded the scope of the common-law "unity of interest" test,¹⁹ and that it does not apply in the ordinary contractor-subcontractor case.²⁰

¹⁶ *Id.* at 676.

¹⁷ Jackson, J., concurring, in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 at 395, 71 S.Ct. 745 (1951).

¹⁸ Petro, "Taft-Hartley and the 'Secondary Boycott,'" 1 *LAB. L.J.* 835 at 908 (1950), suggests that the frequent reference on the floor of Congress to the term "secondary boycott" may mean only "that senators were having the same trouble finding a shorthand term to describe the activities prohibited by 8(b)(4) that others are having today."

¹⁹ In *Wine, Liquor, & Distillery Workers Union, Local 1, AFL (Shenley Distillers Corp.)*, 78 NLRB 504 (1948), the Board distinguished *Douds v. Metropolitan Federation, etc.*, holding a wholesaler not to be the "ally" of the manufacturer whose products he distributes, thus that when the producer is the primary party to a labor dispute activity undertaken to force the wholesaler to cease dealing with him is in violation of §8(b)(4)(A). Enforced, *NLRB v. Wine, Liquor, & Distillery Workers Union*, (2d Cir. 1949) 178 F. (2d) 584. The "unity of interest" test of *Bossert v. Dhuy*, 221 N.Y. 342, 117 N.E. 582 (1917), would have given the opposite result, for none of the limitations upon *Goldfinger v. Feintuch*, 276 N.Y. 281, 11 N.E. (2d) 910 (1937), would have taken away the union's privilege to take secondary action against one who purchases for resale the primary employer's product. Dennis, "The Boycott under the Taft-Hartley Act," N.Y.U. THIRD ANNUAL CONFERENCE ON LABOR 367 at 426 (1950).

That the Board will follow the "ally" doctrine when it sees the circumstances to warrant it is indicated by its holding in *Marine Cooks and Stewards Union (Irwin-Lyons*

The other limitation read into section 8(b)(4)(A) originated with the Labor Board, and has been of much more significance: that "primary" action is privileged although it has "secondary" effects. The inception of the limitation was in the *Pure Oil* case,²¹ which concerned a picket line set up in connection with a strike against Standard Oil around a dock owned by Standard but used jointly by Standard and Pure pursuant to an arrangement whereunder Standard employees would service both companies' shipments, and "hot cargo" letters written by the Standard union to a union representing employees of a transport company requesting them not to handle shipments at that dock if loaded by Pure employees. Pure's employees did honor the picket line and did not enter upon the dock to service Pure shipments there during the pendency of the strike. There was some question, in the Board's view of the case, as to whether an object of inducing Pure's employees not to cross the picket line was to force discontinuance of the business relation between Pure and Standard, but even assuming that it was, the Board saw no violation of section 8(b)(4)(A). The Board accepted Judge Rifkind's interpretation that the section was intended to reach only secondary action in the nature of the common law secondary boycott and "does not outlaw any of the primary means which unions traditionally use to press their demands on employers."²² Thus although the object and effect of the picketing of the primary employer's dock was to force Pure, a secondary, neutral party, to cease doing business with the primary employer, such picketing was nevertheless privileged, because it took place at the primary employer's premises. The same reasoning was used to uphold the "hot cargo" letters, for, although sent away from Standard's premises, the services whose nonrendition they solicited would have been performed only on Standard's premises.²³

Lumber Co.), 87 NLRB 54 (1949), that a lumber company and a transport company which were under common stock ownership and managerial control, and whose operations were coordinated, were such "allies" that action against one was privileged although in enforcement of a demand against the other.

²⁰ *Polishers Union (Climax Machinery Co.)*, 86 NLRB 1243 (1949); *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 71 S.Ct. 943 (1951), reversing the District of Columbia circuit's determination, 186 F. (2d) 326 (1950), that an electrical subcontractor is the "ally" of the general contractor on the same construction job.

²¹ *Oil Workers International Union (Pure Oil Co.)*, 84 NLRB 315 (1949).

²² *Id.* at 318.

²³ "The appeals contained in the letters . . . thus amounted to nothing more than a request to respect a primary picket line at the Employer's premises. This is traditional primary strike action. Accordingly, we conclude that none of the Union's actions herein were violative of Section 8(b)(4)(A)." *Id.* at 319.

Subsequent Board decisions continue the primary-secondary distinction which originated in the *Pure Oil* case.²⁴ The Board's approach in most of the cases susceptible to this analysis, at least up until the recent Supreme Court decisions, was to consider the "situs" of the labor dispute: if the activity claimed to violate section 8(b)(4)(A) was wholly at this "situs" or was intended to induce a refusal to perform services there, then it was primary, and privileged. This "situs" could be "ambulatory," and "may even come to rest temporarily at the premises of another employer."²⁵ Thus, where the primary employer was a trucking company, the Board considered the situs of the dispute to be each of the employer's trucks, and held it permissible for the union to follow the trucks and picket them when they stopped to pick up or deliver shipments. Although the picketing was designed to encourage the shippers' employees not to handle at any time goods which had been or were to be carried by the primary employer, and its object was disruption of the latter's business with the shippers, it all took place at the situs of the dispute, and was therefore primary action and not in violation of section 8(b)(4)(A).²⁶ Similarly, the situs of a dispute over working conditions on a ship was held to be the ship itself, so that while the ship was being repaired and fitted out at a shipyard, the union could picket the gate of the shipyard itself, since this was as close as it could reasonably get to the ship, even though the acknowledged object was to induce employees of the shipyard not to work on the ship, and thereby to force the disruption of the business relation between the owner of the ship and the shipyard.²⁷ After some initial

²⁴ Teamsters Union (International Rice Milling Co.), 84 NLRB 360 (1949), dismissal upheld, *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 71 S.Ct. 961 (1951); United Electrical Workers (Ryan Construction Corp.), 85 NLRB 417 (1949); Lumber & Sawmill Workers Union (Santa Ana Lumber Co.), 87 NLRB No. 135 (1949); Newspaper & Mail Deliverers Union (Interborough News Co.), 90 NLRB No. 297 (1950).

²⁵ Sailors Union of the Pacific (Moore Dry Dock Co.), 92 NLRB No. 93 (1950).

²⁶ Teamsters Union (Schultz Refrigerated Service, Inc.), 87 NLRB 502 (1949). The case has been limited to its facts. Thus it is a violation to picket the shipper at times when the primary employer's truck is not there, Teamsters Union (Sterling Beverages, Inc.), 90 NLRB 275 (1950), or to telephone the secondary employer's employees and request their compliance, Amalgamated Meat Cutters (Western, Inc.), 93 NLRB No. 40 (1951). Cf. *Elliott v. Amalgamated Meat Cutters*, (D.C. Mo. 1950) 91 F. Supp. 690, where §10(1) injunction was denied against this same activity, the court citing the Schultz case as controlling.

²⁷ Sailors Union of the Pacific (Moore Dry Dock Co.), 92 NLRB No. 93 (1950). The Board did, however, acknowledge that the right to engage in activity at the situs of the dispute is not as broad when the situs is at a secondary employer's premises as it is when at the premises of the primary employer, and set out the conditions under which its "ambulatory situs" doctrine would privilege picketing a secondary employer: (1) that the picketing is limited to times when the situs of the dispute is in the secondary employer's

doubt,²⁸ analogous reasoning was applied in respect to blacklists and "hot cargo" letters by which a union induces employees of others not to perform services in the course of their employer's business dealings with the primary employer. Even when such services would have been performed other than at the situs of the dispute,²⁹ and even though it would have been a violation had the same inducement been by direct solicitation,³⁰ the Board considered these activities privileged because they were "a traditional weapon used by labor organizations in direct support of a primary labor dispute."³¹

In contrast, however, to its propensity in most types of cases to limit the scope of section 8(b)(4)(A) by reference to standards not provided for in the act, the Board's decisions in the construction field present an anomalous picture. The construction industry is a unique one. The "job"—the particular building being erected or the project being carried out—is to a considerable degree the unit of employment, with many employers often concurrently engaged on the same job, and each hiring most of his labor needs by the job rather than maintaining a complete staff at all times. As a consequence of this unusual fluidity of labor and the resultant needs by employees for something to take the place of the ordinary worker's job security, and by employers for a ready source of labor supply on which to draw, there was a natural impetus toward a closed shop which was both of earlier inception and stronger than in most industries.³² In the enforcement of their closed shop, construction workers became quite accustomed to refusing to work on any job on which any nonunion labor was employed, by whatever employer. Because, then, the refusal to work alongside nonunion men was such a

premises; (2) that at the time of the picketing the primary employer is engaged in its normal business at the situs; (3) that the picketing is limited to places reasonably close to the location of the situs; and (4) that the picketing discloses clearly that the dispute is with the primary employer.

²⁸ Bricklayers Union (Osterink Construction Co.), 82 NLRB 228 (1949).

²⁹ As in Pure Oil, 84 NLRB 315 (1949).

³⁰ Amalgamated Meat Cutters (Western, Inc.), 93 NLRB No. 40 (1951).

³¹ Denver Building & Construction Trades Council (The Graumann Co.), 87 NLRB No. 136 (1949), overruling Osterink, 82 NLRB 228 (1949); distinguishing United Brotherhood of Carpenters & Joiners (Wadsworth Building Co., Inc.), 81 NLRB 802 (1949) [enforced, United Brotherhood of Carpenters & Joiners v. NLRB, (10th Cir. 1950) 184 F. (2d) 60, cert. den. 341 U.S. 947, 71 S.Ct. 1011 (1951)], where blacklisting a secondary employer, in order to induce his employees to strike or refuse to perform services, thus to force disruption of his business with the primary employer, was held in violation of §8(b)(4)(A).

³² Comment, "The Impact of the Taft-Hartley Act on the Building and Construction Industry," 60 YALE L.J. 673 at 677 (1951). Cf. the shipping industry, in which the same factors were present.

“traditional weapon” of unions in the construction industry,³³ it would have been logical for the Board to hold it privileged and, though aimed at disruption of the business relation between the general contractor in charge of a job and the subcontractor employing nonunion labor thereon, not to violate section 8(b)(4)(A). It could readily have so held, either by application of Judge Rifkind’s “ally doctrine” to find the general contractor to have such a substantial interest in the outcome of labor demands made upon a subcontractor on the same job that their relation was not “doing business” within the act, or by reliance on its own usual primary-secondary distinction to find the situs of any dispute with a building subcontractor to be the job on which he is engaged and thus to hold any activity at the jobsite to be purely primary and not in violation of the section. Taking neither of these approaches, however, the Board simply made a literal interpretation of section 8(b)(4)(A) in the cases thereunder having to do with attempted disruption of business relations in the construction industry, and did not try to reconcile these cases with those following its *Pure Oil* rationale. Thus, in two different cases the Board held section 8(b)(4)(A) violated by picketing by a union to induce union laborers on a construction job to walk off while nonunion laborers were employed thereon by an electrical subcontractor, and regarded as immaterial the distinction that in one case the union was the representative of the union members employed on the job,³⁴ while in the other it was a “stranger” union, an electrical workers’ union objecting because of the direct prejudice to its members in the employment of the nonunion labor.³⁵

The Board’s literal approach to section 8(b)(4)(A) in the construction cases is unobjectionable in itself, except that it is difficult to see why the literal approach would not be at least as appropriate in the cases outside the construction industry, or, alternatively, why a Board which was accustomed to letting the applicability of section 8(b)(4)(A) depend upon the distinction between primary and secondary action did not do the same in the construction cases. One writer has expressed the

³³ It should have been of no particular significance that §§8(a)(3) and 8(b)(2) now make it an unfair labor practice on the part of both employers and unions to execute closed-shop contracts.

³⁴ *Denver Building & Construction Trades Council (Gould & Preisner)*, 82 NLRB 1195 (1949), enforced, *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 71 S.Ct. 943 (1951).

³⁵ *International Brotherhood of Electrical Workers (Samuel Langer)*, 82 NLRB No. 132 (1949), enforced, *International Brotherhood of Electrical Workers v. NLRB*, 341 U.S. 694, 71 S.Ct. 954 (1951).

opinion that the primary-secondary and "ally" tests are inapplicable because all employers have the same place of business,³⁶ but if this be the criterion, it would seem equally applicable in the case where the primary employer's ship is in the secondary employer's shipyard,³⁷ and in the other "ambulatory situs" cases. Most of the other writers have instead viewed the two classes of cases as indistinguishable, and the Board's difference in approach anomalous.³⁸ At least one circuit of the court of appeals has agreed; the District of Columbia circuit in denying enforcement of the Board's order in its *Gould & Preisner* case regarded both the "ally doctrine" of Judge Rifkind and the Board's customary primary-secondary approach as privileging the refusal to work with nonunion labor on a construction job,³⁹ and Judge Learned Hand in writing the opinion enforcing the order in the *Langer* case suggested that had it not been for the fact that the nonunion employees complained of were not present on the job when it was picketed, he might have considered the picketing primary, therefore privileged.⁴⁰ Perhaps the anomaly is best pointed up by noting that the Board considered picketing by a union of a construction site with the object of forcing disruption of the business relation between the owner and one of the contractors on the job to violate section 8(b)(4)(A) when the owner was the neutral and the union's dispute was with the contractor,⁴¹ but not to violate it when the union was seeking to enforce demands against the owner, and it was the contractor who was the neutral.⁴²

Were it necessary to choose between the literal approach to section 8(b)(4)(A) and the primary-secondary approach, with no third alternative, the selection of one as the sounder of the two would be a diffi-

³⁶ Note, 64 HARV. L. REV. 781 at 800 (1951).

³⁷ Moore Dry Dock Co., 92 NLRB No. 93 (1950).

³⁸ Petro, "Primary' and 'Secondary' Labor Action—the Case of the Neglected Proviso," 1 LAB. L.J. 339 at 415 (1950); Dennis, "The Boycott under the Taft-Hartley Act," N.Y.U. THIRD ANNUAL CONFERENCE ON LABOR 367 at 407 (1950); Comment, 60 YALE L.J. 673 at 689 (1951).

³⁹ Denver Building & Construction Trades Council v. NLRB, (D.C. Cir. 1950) 186 F. (2d) 326, reversed, 341 U.S. 675, 71 S.Ct. 943 (1951).

⁴⁰ International Brotherhood of Electrical Workers, AFL v. NLRB, (2d Cir. 1950) 181 F. (2d) 34 at 37; affirmed, 341 U.S. 694, 71 S.Ct. 954 (1951).

⁴¹ United Brotherhood of Carpenters & Joiners (Watson's Specialty Store), 80 NLRB 533 (1949), where the union, representing union employees on the job, objected to the presence of nonunion employees of a firm which supplied and installed floor covering, and struck in order to force the owner to cease doing business with this firm. Order enforced, Local 74, United Brotherhood of Carpenters and Joiners of America, AFL v. NLRB, 341 U.S. 707, 71 S.Ct. 966 (1951).

⁴² United Electrical Workers (Ryan Construction Corp.), 85 NLRB 417 (1949), where the union, representing the employees of a manufacturing plant, picketed the entire plant, including a part under construction, to force the general contractor off the job pending solution of a labor dispute with the owner.

cult one to make. On the one hand, the legislative history of the act indicates that the major concern of Congress was the protection of employers from strikes or other work stoppages by their employees in the absence of any labor dispute actually between them.⁴³ On the other, the language of section 8(b)(4)(A) is not patently ambiguous, but is concerned with a motive which was apparently to be an unlawful one under any and all circumstances. Regardless of whether one may feel that the policy carried out by the Board has been a sound one, he can hardly admit that the Board has been justified in disregarding the clear, though sweeping, prohibitions in the act to hold activity privileged merely by reference to the act's legislative history. Perhaps, happily, the Supreme Court has found the answer to this enigma.⁴⁴

II. *The Supreme Court's Approach to Section 8(b)(4)(A): Four Recent Decisions*

The four recent Supreme Court decisions under section 8(b)(4)(A) uphold the conclusions of the Board in each case; whether the Court agrees with all of the reasoning by which the Board had reached those conclusions is not made clear. Probably the Board will take the decisions as endorsement in full of at least its primary-secondary distinction and its approach to the construction industry cases, rephrase its related "ambulatory situs" doctrine in the terms used by the Court, and continue to apply section 8(b)(4)(A) in essentially the same way as heretofore. Probably at least a few of the circuits of the court of appeals will consider that the decisions substitute new tests for legality under

⁴³ There is reference in S.Rep. No. 105 on S. 1126, 80th Cong., 1st sess., 1947, at p. 22, to the famous I.B.E.W. Local No. 3 ban on the installation in the New York area, of electrical products manufactured except in that area by Local No. 3 members, which was held to violate the Sherman Anti-Trust Law only by virtue of the fact that it was the product of agreement between the union and the electrical manufacturers in the area. *Allen-Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*, 325 U.S. 797, 65 S.Ct. 1533 (1945). Many individual members of Congress cited as exemplifying the aim of §8(b)(4)(A) such situations as the dumping by unions of "hot milk" in the production, transportation, or distribution of which other than union labor was employed, 93 CONG. REC. 3559, 3560, A1295 (1947). "Thus it was made an unfair labor practice for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B. Similarly it would not be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of, or does business with, employer B." House Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st sess., 1947, at p. 43.

⁴⁴ Another answer has been suggested, but aside from acceptance by the trial examiner (but not the Board) in *Newspaper & Mail Deliverers Union (Interborough News Co.)*, 90 NLRB No. 297 (1950), has never received consideration by the Board or the courts: that the proviso appended to §8(b)(4) (see note 4 supra) indicates the sole limitation

section 8(b)(4)(A), and by application thereof will find the Board to have improperly dismissed certain unfair labor practice charges. Once again divergent cases will go up to the Supreme Court, and perhaps then the question will be finally resolved. In the meantime, however, these four latest decisions are useful guideposts.

The only unanimous decision is that in *NLRB v. International Rice Milling Co.*,⁴⁵ which reverses the fifth circuit to uphold dismissal by the Board of a complaint against activity which was wholly in the immediate vicinity of the primary employer's manufacturing plant. The union involved, in attempting to organize the employees of the charging employer, struck and picketed the employer's plant. As the case came up to the Supreme Court, the only aspect of this activity in question was the "encouragement"⁴⁶ of two employees of a customer of the plant not to cross the picket line in a delivery truck to pick up goods ordered by their employer.⁴⁷ The Board had applied its *Pure Oil* primary-secondary distinction, and had held the picketing privileged because it took place at the situs of the dispute. The court of appeals had taken a literal approach to section 8(b)(4)(A), had seen no merit in the primary-secondary distinction, and had set aside the Board's order. The Supreme Court, per Burton, J., who wrote the opinions in all four cases, avoids deciding whether the fact that activity by a union is confined to the situs of a dispute, or is intended to induce a work stoppage at that situs only, privileges it, but in stating that "the limitation of the complaint to an incident in the geographically restricted area near the mill is significant, although not necessarily conclusive,"⁴⁸ implies dis-

Congress intended to be placed upon §8(b)(4)(A)'s scope, in addition to those explicit therein, thus that all activity away from the situs of the dispute is in violation, when undertaken for the proscribed object, and that such activity is also a violation when engaged in at the situs, unless in connection with a majority strike against the primary employer. Petro, articles in 1 LAB. L.J. 339, 835, and 1075 (1950). The argument is compelling, but Tower, "The Puzzling Proviso," 1 LAB. L.J. 1019 (1950) answers it, noting that since the proviso is aimed at saving only individual action, while nothing in the act makes an individual employee's act ever any violation, it should not be relied on too heavily. Tower notes that the proviso was merely copied from an earlier bill, the Ball Bill, S. 55, §204(a), which would have made certain individual employee actions unlawful, and sees the only intent behind it to be, "Probably unnecessary but let's make sure," id. at 1021.

⁴⁵ 341 U.S. 665, 71 S.Ct. 961 (1951).

⁴⁶ There was some application of force by the pickets, but the presence or absence of violence is immaterial under §8(b)(4)(A), which is concerned only with motive. Id. at 672.

⁴⁷ The original complaint had charged also that the union had encouraged railroad employees not to handle the primary employer's supplies or product, both by picketing and by direct solicitation away from the plant. The Board had dismissed this charge on the theory that railroad employees were not "employees" within the meaning of §8(b)(4)(A). The court of appeals held that they were, and remanded. The Board sought no review of that phase of the decision.

⁴⁸ 341 U.S. at 671.

satisfaction at least with those cases in which the Board has based its determination exclusively on the consideration whether the activity was located at or connected with the situs of the dispute. The principal basis of the Supreme Court's decision is that because the inducement complained of was directed to only the two employees of the secondary employer, to encourage them as individuals to discontinue their then pending trip to the plant, but not to induce any activity more widespread than that on the part of employees of neutrals to the dispute, it "did not amount to such an inducement or encouragement to 'concerted' activity as the section proscribes."⁴⁹

Perhaps the holding in the *Rice Milling* case is merely evasive of the principal problem, but additional language in the opinion suggests instead that a real limitation has been placed upon section 8(b)(4)(A). Apparently the Court will consider the section to be unconcerned with any inducement or encouragement directed to an employee to make his individual determination not to perform services, whether or not an object in so encouraging him is to interrupt his employer's business relation with an employer from whom a labor concession is being sought and thus to enforce the demand against the latter employer. If this be so, then a truly individual solicitation anywhere is privileged. Further, the Court apparently considers picketing usually to be nothing more than an individual solicitation to each person having business beyond the picket line not to transact it pending settlement of the dispute: "A union's inducement or encouragement reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees."⁵⁰ Doubt may well be expressed as to the validity of any characterization of picketing which does not recognize its quality as a "signal" to union members in general to follow a union policy of respect for every picket line, and which considers there to be merely "individual," rather than "concerted," action even in the summation of many separate determinations to carry out that policy.⁵¹ At least this characterization of picketing, however, is more realistic than that which finds it to constitute mere publication of the exist-

⁴⁹ Id. at 670.

⁵⁰ Id. at 671.

⁵¹ At least it is easier now to characterize as individual action the determination by an individual union member to act in accord with what he knows to be union policy, than it was when it was perfectly lawful for a union to punish a refusal so to act by suspension or revocation of union membership, with consequent loss of employment. Sec. 8(b)(2) makes it an unfair labor practice for a labor organization to ask, and §8(a)(3) similarly

ence of a labor dispute.⁵² Besides, there is every possibility for the application of a "rule of reason" here: that so long as picketing, or any other solicitation, is reasonably close to a separate appeal to each individual person who approaches to make his own determination to withhold services, then it is to be held privileged, but if the inducement is unreasonably close to one of group action, then the privilege is lost, and section 8(b)(4)(A) has been violated.

Support is lent by the other three decisions to the view that *Rice Milling* really rejects the Board's distinction between secondary action and primary action with secondary effects as the test for section 8(b)(4)(A) application, and substitutes for it a consideration whether inducement has been of "concerted" or "individual" action. In these the Court upholds the Board in three of its most important construction industry decisions. While the Board followed a primary-secondary distinction in other cases, it did not make sense for it to ignore that distinction in *Gould & Preisner*,⁵³ *Langer*,⁵⁴ and *Watson*,⁵⁵ but the Court has no difficulty in finding "concerted action" or an inducement thereto, and therefore a violation of section 8(b)(4)(A), in each case. In both *Gould & Preisner* and *Watson* the union, representing construction workers on the job, actually called a strike to enforce its demand that nonunion employees of another employer engaged on the same job be replaced with union members. An object of the strike in each case being disruption of the business relation between a neutral—the general contractor in the former case, the owner in the latter—and the primary employer, there could never be any doubt but that there was a literal violation of section 8(b)(4)(A), a strike being not only "concerted action," but also expressly declared to be an unfair labor practice when undertaken for such an object. In *Langer* the case against the union was not so clear: it was charged not with striking or engaging in a concerted refusal to perform services, but with the inducement of such activity on the part

forbids the employer to yield to such a request, for dismissal of "an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." Still, however, there is the "momentum of fear" aspect present, as well as the practical fact that it is easier and safer to follow union policy blindly than to "buck the union," even if you know you can win out eventually.

⁵² Cf. *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736 (1940).

⁵³ *Supra* note 34.

⁵⁴ *Supra* note 35.

⁵⁵ *Supra* note 41.

of other employees, and, as in *Rice Milling*, there were but two such employees induced. The number of employees to whom a union's inducement is directed, however, is seen not to control, and the fact that here those employees, whose employer was a neutral carpentry subcontractor engaged on the same job as the nonunion electrical subcontractor with whom the union was in dispute, constituted the entire labor force (except for the nonunion electricians, who were not present anyway) on the project picketed and were induced to leave their jobs entirely, apparently made the inducement conclusively one of "concerted" action.⁵⁶

If this view is correct—that only when the action sought is purely individual, as opposed to "concerted," may a union with impunity induce or encourage employees of neutrals to refuse to perform services, where an object is to disrupt business relations between the neutral employer and one with whom the union is in dispute—then different results would be required in many of the cases with which the Board has been concerned. In the Board's *Pure Oil* case,⁵⁷ where the primary-secondary distinction originated, even though it is said that the appeal in the picketing of the Standard dock was to each approaching Pure employee to make his individual determination not to work on the dock while its owner remained "unfair" to the picketing union, a violation should have been found nevertheless in the "hot cargo" letters addressed to a union requesting it to order its members to refuse to handle certain commodities under certain circumstances, since these could not be said to appeal to anything but "concerted" action. "Hot cargo" letters and blacklisting, because addressed to union members and inducing compliance by them with a union policy against performing any services the indirect benefit wherefrom will accrue to the listed employer, must always be regarded as an inducement to "concerted" action, and cannot now be excused as "traditional primary strike action," and the cases so holding⁵⁸ must be considered in effect repudiated by the Supreme Court. Similarly, those cases where respect for a "primary" picket line was sought by inter-union negotiations can now be considered of doubt-

⁵⁶ Jackson, Douglas, and Reed, JJ., dissented in each of the three construction cases, without opinion except in *Gould & Preisner*, where Douglas, Reed joining, saw a refusal to work alongside nonunion men on the same job to be such "a basic protest in trade union history" that its legality ought not to depend on whether one or more than one employer is engaged on a single job. Citing Judge Rifkind's holding in *Douds v. Metropolitan Federation*, (D.C. N.Y. 1948) 75 F. Supp. 672, they considered the residuary right to strike in §13 to limit §8(b)(4)(A) to apply only when "an industrial dispute spreads from the job to another front."

⁵⁷ *Supra* note 21.

⁵⁸ Cases cited in notes 30 and 31 *supra*.

ful authority insofar as such negotiations were held immaterial to the issue of section 8(b)(4)(A) violation.⁵⁹ In the main, however, most of the cases in which the Board has held activity to be "primary" and therefore privileged involved only picketing by which employees of neutral employers whose own employment was wholly at the situs of the primary dispute were induced to stay out of the picketed area. Although such picketing may yet be considered to encourage "concerted" action, apparently the "individual-concerted" distinction would yield the same result in those cases as did the Board's primary-secondary approach.

III. *The Effect of Section 8(c)*

Although the status today of "primary action having secondary effects" may still be in doubt, the Court has definitely upheld the Board's position in regard to another possible limitation upon the application of section 8(b)(4)(A). In its *Wadsworth* case,⁶⁰ the Board denied that section 8(c), declaring that "the expressing of any views . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or promise of benefit," meant that either peaceful picketing or the publication of an unfair list, although intended to induce employees to refuse to perform services and having as an object disruption of a neutral's business relation with an employer from whom a concession was being sought, were outside the ban of section 8(b)(4)(A). Once again the Board's recourse was to the legislative history of the act, to conclude that it would not be possible to reach most of the cases with which the section was intended to deal if activity otherwise in violation thereof were to be considered privileged as "free speech" by section 8(c). Over the argument that there is no ambiguity in section 8(c) itself which justifies resort to the legislative history in order to find an expression of views to be unlawful inducement or encouragement under section 8(b)(4)(A), the Supreme Court in *Gould & Preisner* and *Langer* substantially accepted the Board's position. In the former the picketing had been merely a "signal" to members of the picketing union and of unions affiliated therewith by which a strike was started in accord-

⁵⁹ *Newspaper & Mail Deliverers' Union (Interborough News Co.)*, 90 NLRB No. 297 (1950).

⁶⁰ *United Brotherhood of Carpenters & Joiners (Wadsworth Building Co., Inc.)*, 81 NLRB 802 (1949), enforced, *United Brotherhood of Carpenters & Joiners v. NLRB*, (10th Cir. 1950) 184 F. (2d) 60, cert. den. 341 U.S. 947, 71 S.Ct. 1011 (1951).

ance with those unions' by-laws. The "signal" feature was absent in the latter case, however, and yet the same approach was taken, which is sufficiently broad to dispose of the section 8(c) argument in the case of unfair listing as well as that of picketing.⁶¹ The rationale is that Congress intended speech to be protected by section 8(c) only when "in furtherance of a lawful object. It serves that purpose adequately without extending its protection to speech or picketing in furtherance of unfair labor practices such as are defined in section 8(b)(4)(A). The general terms of section 8(c) appropriately give way to the specific provisions of section 8(b)(4)."⁶²

IV. *Conclusion*

If by these recent decisions the Supreme Court is to be understood as rejecting a test for legality under section 8(b)(4)(A) which has reference solely to the consideration whether activity was or was not at the "situs" of a labor dispute, then there has finally been some needed attention paid to the actual language of that section. Granted that congressmen in 1947 and everyone else since have spoken of that section as the "secondary boycott" section of the act, it is nevertheless possible neither to include within it all that common law courts were willing to enjoin as "secondary boycotts" nor to restrict its scope to only such activities as may be so designated. The phraseology which Congress adopted in section 8(b)(4)(A), in preference to a condemnation of particular kinds of activity to which names had already been given,⁶³ condemns instead the motive for which a union calls or induces any concerted refusal to perform services, and hardly permits resort to the legislative history for application of a "situs" test, even if the history were clear in that respect.⁶⁴ What limitations there are, then, should

⁶¹ Certiorari was denied in the appeal from enforcement of the Board's Wadsworth order on the same day as these other cases were decided, *supra* note 60.

⁶² *International Brotherhood of Electrical Workers v. NLRB*, 341 U.S. 694 at 704-5, 71 S.Ct. 954 (1951).

⁶³ Cf. H.R. 3020 as originally reported in the 80th Congress, which would have made it unlawful, §12(a), to call, authorize, engage in, or assist "any sympathy strike or illegal boycott . . ." and then proceeded to define those terms in language not dissimilar to that finally used in §8(b)(4)(A) as enacted.

⁶⁴ If Jackson's view, that the legislative history, when considered, should never include other than committee reports, *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 at 395, 71 S.Ct. 745 (1951), were accepted, it would be necessary to note that the term "secondary boycott," although used frequently on the floor of Congress, appears but once in

be found in the act itself. If the Court means what it has seemed to say, there is recognition of a satisfactory limitation—satisfactory in the sense both that it is found in the language of the act, without a wholly incongruous construction of that language, and that it satisfies the need for some limitation upon the sweeping condemnation of impairment of a neutral's business relations as an object of union activity.

Robert S. Griggs, S. Ed.

a committee report, and then only by way of a statement that the section would cover such a secondary boycott as was involved in the Allen-Bradley case, 325 U.S. 797, 65 S.Ct. 1533 (1945).